

Macatangay (Migration) [2021] AATA 3492 (27 August 2021)

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DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANTS: Mr Joel Macatangay
Mrs Susan Macatangay
Mr Mark Justine Macatangay
Miss Shane Jewel Macatangay
Mr Bryle Dustin Macatangay
Miss Mikaela Sandy Macatangay
Miss Samantha Jill Macatangay

CASE NUMBER: 1836655

HOME AFFAIRS REFERENCE(S): BCC2017/814926

MEMBER: Penelope Hunter

DATE: 27 August 2021

PLACE OF DECISION: Sydney

DECISION: The Tribunal affirms the decision not to grant the applicants Regional Employer Nomination (Permanent) visas.

Statement made on 27 August 2021 at 2:10pm

CATCHWORDS

MIGRATION – Regional Employer Nomination (Permanent) visa – Subclass 187 Regional Sponsored Migration Scheme – bogus document with the visa application – false educational qualifications – compelling or compassionate circumstances – financial hardship – paying income tax – decision under review affirmed

LEGISLATION

Migration Act 1958, ss 5, 65, 359
Migration Regulations 1994, Schedule 2, cls 187.213, 187.223; Schedule 4, Public Interest Criterion 4020; r 1.03

CASES

Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274
Kaur v MIBP [2017] FCAFC 184
Mudiyanselage v MIAC [2012] FMCA 887

Trivedi v MIBP [2014] FCAFC 42
Vyas v MIMAC [2013] FCCA 1226

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 10 December 2018 to refuse to grant the applicants Regional Employer Nomination (Permanent) visas under s 65 of the *Migration Act 1958* (Cth) (the Act).
4. The applicants applied for the visas on 1 March 2017. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl 187.213 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because the delegate found that Public Interest Criterion (PIC) 4020 was not met. A copy of the delegate's decision was provided to the Tribunal with the application for review.
5. The first named applicant (the applicant) is the primary applicant for the visa. The remaining applicants had applied for the visa on the basis of being a member of his family unit. The applicant appeared before the Tribunal on 20 August 2021 by video conference to give evidence and present arguments. The applicant was supported at the hearing by his friend, Peter Trewick.
6. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

7. The issue in this review is whether the applicant meets PIC 4020 as required by cl 187.213 for the grant of the visa. Broadly speaking, this requires that there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1).
8. The requirements in PIC 4020(1) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given, a bogus document or information that is false or misleading in a material particular?

9. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
10. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by

the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.

11. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
12. As part of the Subclass 187 visa application the applicant provided evidence of his English language ability which included some educational qualifications including a transcript of record from Golden Gate College, Batangas City, Philippines dated 8 April 2010 and a letter from the college Registrar confirming his enrolment and that his language of instruction was English. Departmental checks and investigations with Golden Gate College, revealed that there was no record of the applicant in the college records and the transcript of record was not authentic/genuine.
13. The Department invited the applicant to comment on the adverse information by letter dated 7 August 2018. The applicant was requested to provide any response within 28 days. The delegate records that they did not receive any further response from the applicant, and on 10 December 2018 a decision was made to refuse the visa.
14. The applicant was invited to comment on the document and the Department finding as set out in their decision at the hearing. The applicant said that it was true that he had provided false documents. He said that at the time he made his visa application he was under pressure, because he was seeking to obtain a position in the last batch of welders to be engaged. He did not have the evidence of English skills and the employment agency asked him to accept false documents and he would just have to pay for it. If he had the college education he was told he would be exempt from the English language test required for the visa application. It was a big opportunity for him to obtain employment in Australia and meant that he would have enough money to support his children's education.
15. Contained within the Department file for the applicant was a certificate issued under s 375A of the Act, which identified that certain folios in the Department file were confidential and not to be disclosed because it would be contrary to public interest. A copy of the certificate was provided to the applicant prior to the hearing, and he acknowledged receipt. The Tribunal told the applicant that it did not consider that the certificate, dated 1 January 2019, was valid as the reasons identified, that they were internal processing documents, were not considered a valid reason for documents to be kept confidential. Furthermore, the certificate had not been signed, and a typed or printed name as found on the certificate did not meet the requirement for a validly executed certificate. The applicant was invited to comment on the certificate and he did not dispute the Tribunal's finding.
16. Although the substance of the information was set out in the delegate's decision record and the applicant had conceded that the transcript of record from Golden Gate College was not a genuine document, the Tribunal also informed the applicant pursuant to the provisions of s 359AA of the Act, that part of the information covered by the certificate would be a reason or a part of the reason for affirming the decision under review. The applicant was informed that the relevant information was a file note and correspondence from Golden Gate College, following Departmental enquiries, that set out his transcript of record was not genuine and that the College was unable to find a record of the applicant as a student. The applicant was told that the information was relevant to whether he had provided bogus documents or false or misleading information, and if relied on could lead to the Tribunal affirming the decision under review. The applicant elected to respond immediately and did not ask for more time. He said that he admitted that the documents from Golden Gate College were false, and

again said that his employment agency had provided them for him, and he did not ask any questions, he just had to pay for them.

17. In relation to the transcript of record from Golden Gate College, Batangas City, Philippines for the applicant dated 8 April 2010, the evidence before the Tribunal is that Golden Gate College did not issue it. The applicant did not dispute this or claim that he had undertaken study in the qualification of the B.S Mechanical Engineering at Golden Gate College relevant to the transcript. On this evidence the Tribunal finds that the transcript of record is a counterfeit document or has been altered by a person who does not have the authority to do so. The Tribunal accordingly finds that it is a bogus document.
18. The Tribunal is satisfied that there is evidence that the applicant has given, or caused to be given, to the Department a bogus transcript of record in relation to his visa application.
19. Therefore, the applicant does not meet PIC 4020(1).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(1)?

20. PIC 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2AA).
21. There is no evidence before the Tribunal that the applicant or any member of his family unit has been refused a visa in the relevant period.
22. Therefore, PIC 4020(2) does not apply.

Should the requirements of PIC 4020(1) be waived?

23. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in reg 1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
24. Guidance on circumstances that may amount to compelling or compassionate circumstances may be found in the Explanatory Statement to SLI 2011, No 13 which introduced PIC 4020, and the Department's policy guidelines.¹ While not binding, the Tribunal may have regard to the Department's interpretation and examples of what may constitute compelling or compassionate circumstances.²
25. According to the Explanatory Statement it was intended that the granting of the waiver would relate solely to compelling circumstances affecting Australia's interests, or the compassionate and compelling circumstances affecting the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, not the interests of the visa applicant.³ The types of circumstances that may involve compelling or compassionate

¹Policy –[Sch4 4020] – Public Interest Criterion 4020 – The integrity PIC - Compelling and/or compassionate circumstances (re-issue date 1/1/18).

²*Mudiyanselage v MIAC* [2012] FMCA 887 where the Court noted it was open for the Tribunal to be guided by Department policy

reasons for waiving the requirements of PIC 4020 identified in the Explanatory Statement include:

- family reasons (for example, unexpected serious or fatal family situations over which the applicant had no control, such as the incapacitation or death of a partner or child or another member of the family unit);
- that family members in Australia would be left without financial or emotional support; and
- a parent in Australia would be separated from their child (for example, if the child was removed with their non-resident parent and would therefore be subject to an exclusion period).⁴

26. In addition, the Department's guidelines suggest that there may be compelling circumstances affecting the interests of Australia if:

- Australia's trade or business opportunities would be adversely affected were the person not granted the visa (noting that gaining employer sponsorship is not considered sufficient grounds for a waiver); or
- Australia's relationship with a foreign government would be damaged were the person not granted the visa; or
- Australia would miss out on a significant benefit that the person could contribute to Australia's business, economic, cultural or other development (for example, a special skill that is highly sought after in Australia) if the person was not granted the visa.⁵

27. The policy states that compelling circumstances affecting the interests of Australia would not include circumstances where the non-citizen merely claims that, if granted the visa, they would work and pay taxes in Australia, pay fees to an education provider or spend money in Australia.⁶

28. Following the hearing the applicant submitted to the Tribunal the following documents:

- i. Email submissions from the applicant and letter dated 17 August 2021, from UGL Pty Limited Operation Manager, confirming start date of employment Thursday, 9 September 2021.
- ii. Email from the Walz Group to the applicant dated 20 August 2021, confirming the offer of a full-time position as a welder and supporting documents including health declaration forms, payroll details, tax file number declaration forms, superannuation forms, clothing request, Coronavirus screen questionnaire, and online induction documents.
- iii. Email submissions from the applicant attaching a schedule of work for work undertaken by the applicant with companies UGL and Downer including

³ Explanatory Statement to SLI 2011, No 13, at 19. The Court in *Vyas v MIMAC* [2013] FCCA 1226 found the ES to be of assistance in considering the plain words of the waiver provision such that it could not be said that it would be sufficient for the applicants to demonstrate that their circumstances were compelling or compassionate alone, but that there has to be a connection with Australia or an Australian citizen or permanent resident, or eligible New Zealand citizen, because otherwise there would be no utility in having those words in the clause (at [14]).

⁴ Explanatory Statement to SLI 2011, No 13, at 19-20.

⁵ Policy –[Sch4 4020] – Public Interest Criterion 4020 – The integrity PIC - Compelling and/or compassionate circumstances –Compelling circumstances affecting the interests of Australia (re-issue date 1/1/18).

⁶Policy –[Sch4 4020] – Public Interest Criterion 4020 – The integrity PIC - Compelling and/or compassionate circumstances Compelling circumstances affecting the interests of Australia (re-issue date 1/1/18).

welder/boilermaker tooling list, property entry and removal form, a candidate information sheet and a data privacy notice and consent form.

- iv. Email submissions from the applicant attaching Australian Taxation Office, Notice of Assessment for the applicant for the year ended 30 June 2021.
29. On 26 August 2021, the applicant sent a further email to the Tribunal, apologising for providing false documents and requesting another chance to work in Australia and apply for a permanent visa.
30. The Tribunal has considered the matters raised by the applicant in relation to waiver, firstly the applicant has submitted that through his employment he has been able to support his family, comprised of his wife and five children in the Philippines, and meet the costs of his children's education. Additionally, during the difficulties experienced in the Philippines due to the COVID-19 pandemic he has also been able to provide financial assistance for his parents. The Tribunal accepts this submission, however all of the applicant's family is located in his home country and the financial support that the applicant would be able to provide to his family through the visa grant is not a compassionate or compelling circumstance affecting the interests of an Australian citizen, Australian resident or an eligible New Zealand citizen.
31. The applicant also submitted to the Tribunal that he has been consistently and gainfully employed in his nominated occupation. The applicant told the Tribunal he has pursued ongoing employment even though this has meant considerable travel. He has had permission to work while holding a bridging visa on review and has contributed to the Australian economy through his income tax. The Notice of Assessment submitted by the applicant records that for the year ending 30 June 2021, the applicant made income tax and Medicare levy contributions in the sum of \$68,978.68 in the relevant year. The Tribunal acknowledges the contributions of the applicant to the Australian economy via his income tax and Medicare levy and surcharges, yet the payment of taxes is not a circumstance different from any other person eligible to be granted a Subclass 187 visa. Department guidelines also specifically identify that compelling circumstances affecting the interests of Australia would not include circumstances where the applicant merely claims that they would work and pay taxes in Australia.
32. Part of the documents and submissions provided by the applicant went to his evidence that since the visa refusal he had not been working for his nominating employer. The Tribunal raised with the applicant concerns that he would otherwise satisfy cl 187.223(5) of Schedule 2 to the Regulations, in that the position to which the application relates was still available to the applicant. Post hearing the applicant has submitted an offer of full-time employment from his nominating employer, the Walz Group in the nominated position. Therefore there is evidence that the nominated position was still available to the applicant. The applicant told the Tribunal that with subsequent employment with the companies UGL and Downer he had been able to considerably increase his salary while awaiting review. He claimed that his various offers of employment demonstrated that he was a well-respected employee with relevant skills and that his English language skills were sufficient for his ongoing employment in Australia. The Tribunal accepts that the applicant has been continually employed and his skills are sought after by several employers. However, it is not satisfied that the fact that the applicant can readily find employment with various companies in Australia is of itself a significant benefit that the applicant could contribute to Australia's business or is otherwise a compelling circumstance affecting the interests of Australian business, an Australian citizen, permanent resident or eligible New Zealand citizen.
33. Finally, in his post-hearing emails to the Tribunal the applicant claimed that he was a good work mate and had helped and guided a lot of apprentices that he has worked with during

his eight years in Australia. He had a lot of Australian mates that invite him for a barbeque or having a good time and celebrations. The Tribunal accepts that the applicant is well regarded by his colleagues and that during his various employment he has assisted his colleagues and has many friends in Australia, and that generally he may be missed if not granted the visa and required to depart Australia. However, it is not satisfied that this general level of appreciation, particularly on the mere submissions of the applicant, rises to the level required to demonstrate the exercise of the waiver. For example there is no evidence that there is anyone dependent upon the applicant in Australia, or that any Australian business will be affected or unable to operate if the visa is not granted. It is also accepted that the applicant regrets his actions in relying on the false qualifications. The Tribunal must also have regard to the seriousness of the applicant's conduct in intentionally providing a fraudulent document in order to obtain a permanent visa. Overall, the Tribunal is not satisfied that these further matters claimed by the applicant give rise to compelling circumstances that affect the interests of Australia, or compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen that justify the grant of the visa. Nor is it established that Australia's trade and business opportunities would be adversely affected or that Australia would miss out on a significant benefit.

34. Having considered the applicant's case, the Tribunal is not satisfied that, singly or cumulatively, there are compelling circumstances affecting Australia's interests, or compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen that justify the grant of the visas.
35. For the above reasons, the Tribunal is not satisfied that the requirements of PIC 4020(1) should be waived pursuant to PIC 4020(4).

DECISION

36. The Tribunal affirms the decision not to grant the applicants Regional Employer Nomination (Permanent) visas.

Penelope Hunter
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...